Supreme Court, U.S.
FILED
AUG 23 1971
E. ROBERT SEAVER, CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-2784

THERESA M. BODNAR,

Petitioner,

vs.

CATHERINE BODNAR, MARGARET BODNAR, individually and as Administratrix of the Estate of MARY H. BODNAR, Deceased, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

in the
Supreme Court
of the
United States

OCTOBER TERM, 1971

No. _____

THERESA M. BODNAR,

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vs.

CATHERINE BODNAR, MARGARET BODNAR, individually and as Administratrix of the Estate of MARY H. BODNAR, Deceased, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, THERESA BODNAR, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, to review the Judgment and Opinion

of said Court, dated April 28, 1971, entered after rehearing was denied on May 25, 1971, which affirmed the judgment of the District Court of the United States for the Southern District of Florida, Miami Division, entered on January 26, 1970.

Petitioner alleges the following:

(a) A transcript of the record in said District Court was filed with the Clerk of said Court of Appeals and it consisted of all of the original record in said District Court, as provided by Rule 10 of the Rules of Appellate Procedure.

(b) The said Original Record was destroyed by fire after its filing in said Court of Appeals, and the Clerk of said Court so notified all attorneys of record by letter dated June 3, 1971, in which was enclosed a certified copy of the Opinion and Judgment sought to be reviewed. A copy of said Opinion and Judgment is attached to this Petition and a copy of said letter of June 3, 1971 is attached to this Petition.

(c) The said Opinion and Judgment of said Court of Appeals has not as yet been reported in any official or unofficial reports of opinion.

(d) Prior to said destruction of said Original Record, Petitioner prepared a printed Appendix to Briefs, containing all things required by Rule 30 of the Rules of Appellate Procedure and served and filed printed copies thereof within the time, in the num-

ber, with the Clerk and on the counsel in strict compliance with the requisites of said Rule 30.

(e) One of said printed copies of said Appendix to Briefs, containing copies of the pleadings and other papers and proceedings in the trial court and being in itself, as a matter of law, a sufficient record upon which said Court of Appeals could and did base its Judgment and Opinion, sought to be reviewed, is filed under separate cover with the Clerk of the Supreme Court in place and instead of the certified transcript of record required by Rule 21 of the Supreme Court Rules.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

The United States Court of Appeals, Fifth Circuit, has decided a federal question in a way in conflict with the decision of said Court in **Schlagenhauf v. Holder**, 379 U.S. 104, 85 S.Ct., 234, 13 L.Ed.2d 152.

STATUTORY JURISDICTION OF SUPREME COURT

28 U.S.C.A. 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

QUESTION PRESENTED FOR REVIEW

The Court of Appeals in its Opinion stated as follows:

1. "The sole issue in this case is whether the District Court could properly dismiss Appellant's (Theresa M. Bodnar) case, without prejudice, after she had refused to submit to a mental examination for the purpose of determining whether she was mentally competent to understand the nature and effect of the litigation she had instituted, so that if needed a guardian ad litem could be appointed."

Petitioner states the question presented for review to be as follows:

2. "Did the Trial Court have jurisdiction over the subject matter or the power to enter that certain order requiring Plaintiff, Theresa M. Bodnar, Appellant, to submit to an examination by doctors for the purpose of determining whether she was mentally competent to understand and comprehend the nature and effect of the litigation; and was such an order valid or void?

THE CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The judicial power of the United States is set forth in Article III, Section 2 of said Constitution and reads as follows:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; between a State and citizens of another State; — between citizens of different States; — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

Rule 35 (a) of the Federal Rules of Civil Procedure reads as follows:

"Rule 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS (a) Order For Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

Rule 17(c) of the Federal Rules of Civil Procedure reads as follows:

> "Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

Rule 12 (h) (3) of the Federal Rules of Civil Procedure reads as follows:

> "(3) Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction over the subject matter, the Court shall dismiss the action."

Rule 60 (b) (4) reads as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . .
>
> (4) the judgment is void; . . . .

CONCISE STATEMENT OF CASE

Neither the District Court nor the Court of Appeals made any decision upon the merits of the civil case before it. The District Court dismissed the same because Petitioner would not submit herself to an examination as to her mental capacity to enable the Court to appoint a Guardian Ad Litem for her if necessary. The Court of Appeals in its Opinion stated:

> "A Trial Court is not powerless to ascertain whether a litigant is competent and if it finds that he is not, to appoint a Guardian Ad Litem."
>
> * * *
>
> "The District Judge, with ample factual basis for apprehending Appellant's incompetence, granted the motion. Appellant nevertheless refused to comply with this order. In view of this deliberate refusal to comply with the order, the Court dismissed the case without prejudice January 26, 1970.
>
> Appellant took no appeal from the final judgment of dismissal, but she did file a petition of mandamus in this Court. We dismissed the petition.
>
> With the judgment now final and unappealable, Appellant filed a F.R.Cic.P. 60(b) (4) motion in the Trial Court in which she sought to vacate the judgment of dismissal on the ground that it was void for want of jurisdiction. F.R.Civ.P. 60(b) (4). The Court denied the 60(b)

motion. The Court had plenary power under F.R.Civ.P. 17(c), of F.R.Civ.P. 35(a), to order the examination of Appellant under appropriate protective restrictions as to which there can be no complaint here."

ARGUMENT

The latest case as to the validity and construction of Rule 35 (a) is Schlagenhauf vs. Holder, 379 U.S. 104 85 S.Ct. 234, 13 L.Ed.2d 152. The first paragraph in the opinion in the above case reads as follows:

> "This case involves the Validity and Construction of Rule 35 (a) of Federal Rules of Civil Procedure as applied to the examination of a defendant in a negligence action."

On page 250 of the Supreme Court Report there was stated the following:

> "While the party seeking Rule 35 discovery need not prove his case before obtaining an order for discovery, it is incumbent upon him affirmatively to demonstrate: (1) the probability that the adverse party's physical and mental condition is relevant and proximate in point of time to the underlying issues of the litigation and that such condition is in controversy; and (2) good cause to believe that a physical or mental examination would best serve to promote the ascertainment of truth and that other measures of discovery of proof are less satisfactory considering the laws solicitude for a party's privacy."

The truth concerning the ownership of joint bank accounts after the death of one joint tenant has not the slightest connection with the mental competency of Petitioner to comprehend and understand the nature of her suit. It is apparent on the face of the Opinion of the Court of Appeals that the District Court and said Court of Appeals were each of the opinion that it had the power to determine the mental competency of a party to a suit, irrespective of any of the issues in the case and in direct conflict with the holding of the Supreme Court in the **Schlagenhauf Case,** which is the leading case on mental examination of parties to suits and has been cited many times by different Courts of Appeals.

The opinion and judgment sought to be reviewed, if permitted to stand in the Federal Reports, in all probability, will result in confusion, as to the holding in the **Schlagenhauf Case** causing needless work in the future for Federal Appellate Courts.

Respectfully submitted,

J. M. FLOWERS
Attorney for Petitioner
1101 Brickell Avenue
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing petition was furnished by mail to the attorneys of record, as required by law, this 23rd day of August, 1971.

J. M. FLOWERS
Attorney for Petitioner
1101 Brickell Avenue
Miami, Florida 33131

ADDENDUM

ADDENDUM

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH, Clerk

Room 408-400 Royal St., New Orleans, La. 70130

June 3, 1971

Clerk
U. S. District Court
P. O. Box 669
Miami, Florida 33101

Re: No. 30514 — Theresa M. Bodnar vs. Catherine Bodnar, Margaret Bodnar, et al. D. C. No. Civ. 68-1386

Dear Sir:

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(XX) Copy of the Court's opinion.

( ) Original record on appeal or review. (SEE ATTACHED LETTER)

( ) Original exhibits.

( ) Bill of Costs approved by this Court.

( ) The judgment provides that appellee pay the costs in this Court. Since the case was docketed in forma pauperis without pre-payment of fees and costs, the Clerk's docketing fee of $25.00 is now payable to this office by appellee, and by copy of this letter counsel is being so advised.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Claudette Staiger
Deputy Clerk

enc.
cc: (Letter only)
Mr. J. M. Flowers
Mr. Sam Daniels
Mr. Irving Cypen
Mr. Harris J. Buchbinder

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH, Clerk

Room 408-400, Royal St., New Orleans, La. 70130

June 3, 1971

TO ALL COUNSEL AND THE DISTRICT CLERK:

RE: No. 30514 — Theresa M. Bodnar vs. Catherine Bodnar, Margaret Bodnar, et al. D. C. No. Civ. 68-1386

I regret to advise that a recent fire in our office has destroyed the original bound record on appeal in this case. We must defer to the District Court the question whether or not the parties will be required to reconstruct its record; and this Court request counsel's cooperation in this regard. We enclose to the Clerk a copy of the reproduced appendix which his court may consider sufficient or which may help the parties in reconstructing the record.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

Add. 4

By /s/ Claudette Staiger

Deputy Clerk

/cms
Enc.
cc: Mr. J. M. Flowers
Mr. Sam Daniels
Mr. Irving Cypen
Mr. Harris J. Buchbinder

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30514

THERESA M. BODNAR,
Plaintiff-Appellant,

versus

CATHERINE BODNAR, MARGARET BODNAR, Individually and as Administratrix of the Estate of MARY H. BODNAR, Deceased, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(April 28, 1971)

Before BROWN, Chief Judge, PHILLIPS* and INGRAHAM, Circuit Judges.

PER CURIAM: The sole issue in this case is whether the District Court could properly dismiss Appellant's (Theresa M. Bodner) case, without prejudice, after she had refused to submit to a mental examination for the purpose of determining whether she was mentally competent to understand the nature and effect of the litigation she had instituted, so that if needed a guardian ad litem could be appointed. We affirm.

*Of the Tenth Circuit, sitting by designation

The Defendants filed a motion for an order requiring Theresa M. Bodnar to submit to an examination to determine if she were mentally competent to understand the nature and effect of her suit.

The District Judge, with ample factual basis for apprehending Appellant's incompetence, granted the motion. Appellant nevertheless refused to comply with this order. In view of this deliberate refusal to comply with the order, the Court dismissed the case without prejudice January 26, 1970.

Appellant took no appeal from the final judgment of dismissal, but she did file a petition of mandamus in this Court. We dismissed the petition.

With the judgment now final and unappealable, Appellant filed a F.R.Civ.P. 60(b) (4) motion in the Trial Court in which she sought to vacate the judgment of dismissal on the ground that it was void for want of jurisdiction. F.R.Civ.P. 60(b) (4). The Court denied the 60(b) motion. The Court had plenary power under F.R.Civ.P. 17(c), cf. F.R.Civ.P. 35(a), to order the examination of Appellant under appropriate protective restrictions as to which there can be no complaint here.

A trial court is not powerless to ascertain whether a litigant is competent and, if it finds that he is not, to appoint a guardian ad litem. Where there is a showing of a substantial question of competency, the Judge with protective restrictions can, in making that determination, require a medical examination. Nothing in *Schlagenhauf v. Holder*, 1964, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152, in considering F.R.Civ.P. 35(a) compels us to reach a contrary result.

AFFIRMED.

Supreme Court, U.S.
FILED
SEP 13 1971
E. ROBERT SEAVER, CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-278

THERESA M. BODNAR,

Petitioner,

vs.

CATHERINE BODNAR, MARGARET BODNAR, individually and as Administratrix of the Estate of MARY H. BODNAR, Deceased, ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals Fifth Circuit

BRIEF OF RESPONDENTS

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SAM DANIELS
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Administrator Ad Litem for the Estate of Mary H. Bodnar, Deceased.

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3-4
FEDERAL RULE OF CIVIL PROCEDURE INVOLVED	4-5
REASONS FOR DENYING WRIT	5-6
CONCLUSION	7
CERTIFICATE OF SERVICE	8

INDEX OF CASES CITED

	Page
Moore v. Roxbury, 85 N.H. 394, 159 A. 359 (1932)	5
Schlegenhauf v. Holder, 379 U.S. 104	6
Smith v. U.S., (D.Ct. Cal. 1959), 174 F.Supp. 828, 272 F.2d 228, 362 U.S. 954	5
Zaro v. Strauss, (5th Cir. 1948), 167 F.2d 218	5

OTHER AUTHORITIES CITED

44 C.J.S., Insane Persons, § 143	5
F.R.Civ.P. 17(c)	4-5
F.R.Civ.P. 60(b) (4)	2, 3
3A Moore's Federal Practice, § 17.26	5
28 U.S.C., § 1254(1)	2

in the

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OCTOBER TERM, 1971

NO. 71-278

THERESA M. BODNAR,

Petitioner,

vs.

CATHERINE BODNAR, MARGARET BODNAR, individually and as Administratrix of the Estate of MARY H. BODNAR, Deceased, ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals Fifth Circuit

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BRIEF OF RESPONDENTS

Petitioner prays that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion here sought to be reviewed is reported as **Bodnar v. Bodnar** (5th Cir. 1971), 441 F.2d 1103. The order of the United States District Court for the Southern District of Florida which was affirmed below is unreported but appears at A. 70.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The opinion of the Court of Appeals is dated April 28, 1971. Petitioner's timely petition for rehearing was denied on May 25, 1971, without opinion.

QUESTION PRESENTED

Plaintiff so conducted herself in a United States district court as to raise serious doubts as to her mental competency. After such conduct, the district court ordered plaintiff to submit to a mental examination to determine if she needed a guardian ad litem. Under such circumstances, was the order requiring the mental examination "void" within the meaning of Federal Rule of Civil Procedure 60(b)(4)?

NOTE: "A" refers to the printed Appendix filed in the Court of Appeals below.

STATEMENT OF THE CASE

In 1968, petitioner filed a complaint against her sisters in the United States District Court for the Southern District of Florida contesting the ownership of certain joint bank accounts and other funds (A. 1). In 1969, the district court appointed an administrator ad litem to represent the estate of the parties' deceased mother (A. 33). Thereafter on motion of the administrator (A. 52), the trial court entered an order finding that serious doubt existed as to petitioner's mental competency (A. 62). Pursuant to this finding, petitioner was ordered to submit to a mental examination to determine "whether, pursuant to Federal Rule 17(c), a guardian ad litem should be appointed to represent and protect the plaintiff's interest or whether some other type of order should be entered for her protection." (A. 63).

After petitioner refused to submit to the examination, the district court dismissed her complaint without prejudice (A. 68). As stated in the opinion below, 441 F.2d at 1104, petitioner did not appeal the dismissal, but did file a petition of mandamus which was dismissed.

Thereafter, petitioner filed a motion to vacate the trial court dismissal under Federal Rule 60(b)(4). The sole basis for the motion was that the order requiring a mental examination was void for want of jurisdiction (A. 69). The trial court denied the motion and, on appeal, the Court of Appeals affirmed, saying at 441 F.2d 1104:

> "... The Court had plenary power under F.R.Civ. P. 17(c), cf. F.R.Civ.P. 35(a), to order the exam-

ination of Appellant under appropriate protective restrictions as to which there can be no complaint here.

A trial court is not powerless to ascertain whether a litigant is competent and, if it finds that he is not, to appoint a guardian ad litem. Where there is a showing of a substantial question of competency, the Judge with protective restrictions can, in making that determination, require a medical examination. Nothing in Schlagenhauf v. Holder, 1964, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152, in considering F.R. Civ.P. 35(a) compels us to reach a contrary result."

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 17(c) provides:

"**Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent

person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

REASONS FOR DENYING THE WRIT

1. The holding below is in complete accord with the provisions of Federal Rule 17(c). The Rule requires the trial court to protect an "incompetent person not otherwise represented in an action". The power and duty to protect an incompetent must, of necessity, include the power to determine whether a party is in need of such protection. Petitioner does not cite and our research does not disclose any decision holding the contrary.

2. While the decision below does not pass on the question, there is at least one decision holding that Rule 35 authorizes a mental examination to determine whether a guardian ad litem should be appointed under Rule 17(c), **Smith v. U. S.** (D.Ct.Cal.1959), 174 F.Supp. 828, appeal dismissed 272 F.2d 228, cert.den. 362 U.S. 954. Cf. 3A Moore's Federal Practice, § 17.26, pp. 905-906.

3. Even in the absence of a specific rule provision, it is generally held that courts have inherent power to make inquiry into a litigant's competency and appoint a guardian ad litem, if needed. E.g., **Moore v. Roxbury,** 85 N.H. 394, 159 A. 359 (1932); 44 C.J.S., Insane Persons, § 143, pp. 306-307. Cf. **Zaro v. Strauss** (5th Cir. 1948), 167 F.2d 218.

4. The decision below is in probable accord with this Court's prior decisions. **Schlegenhauf v. Holder,** 379 U.S. 104, makes it abundantly clear that the district courts have the power to order mental and physical examinations, the issue in a given case being whether there has been a "usurpation of power".

CONCLUSION

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

IRVING CYPEN
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Attorney for Catherine Bodnar and Margaret Bodnar, Individually and as Administratrix of the Estate of Mary H. Bodnar, Deceased

SAM DANIELS
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Miami, Florida 33131
Administrator Ad Litem for the Estate of Mary H. Bodnar, Deceased.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Supreme Court Rule 33, true copies of the foregoing were mailed on this _____ day of September, 1971, to J. M. FLOWERS, ESQUIRE, Attorney for Petitioner, 1101 Brickell Avenue, Miami, Florida 33131.

_____